United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7208, 76-7211

ORIGINAL

To be argued by
ROBERT S. BLANC

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United States Court of Appeals

FOR THE SECOND CIRCUIT

BENITO LOPEZ,

Plaintiff-Appellee,

—against—

EGAN OLDENDORF,

Defendant and Third Party Plaintiff-Appellant and Appellee,

P/S

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,

Third Party Defendants-Appellants and Appellees.

BENITO LOPEZ,

Plaintiff-Appellee,

—against—

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,

Defendants-Appellants and Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF THIRD PARTY DEFENDANT-APPELLANT AND APPELLEE, HOFFMAN RIGGING AND CRANE SERVICE, INC.

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15(a) 9

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3 J. Moore, Federal Practice (2d ed. 1974):

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¶ 15.08[4] at 898 9

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The Issues on Appeal

By this appeal the third party defendant-appellant and appellee, Hoffman Rigging and Crane Service, Inc. (hereinafter "Hoffman"), presents the following issues for review by this Court:

1. Was the crane operator, Leo Hogan, the borrowed servant of the stevedore, International Terminal Operating Co., Inc. (hereinafter "ITO"), so that Hoffman is not liable to the plaintiff longshoreman, Benito Lopez (hereinafter "Lopez"), the vessel owner, Egan Oldendorf (hereinafter "Oldendorf"), or ITO, by way of indemnity or otherwise?

2. Did the court have jurisdiction in the direct action by Lopez against Hoffman?

3. Was Lopez' direct action against Hoffman time-barred?

The Nature of the Case

The plaintiff, a longshoreman, who was a New Jersey citizen and resident, brought a jury action for damages against Oldendorf alleging that he had sustained personal injuries on October 21, 1968, aboard M/V JOBST OLDENDORF, at Pier 28, Port Newark, New Jersey, as a result of the negligence of the defendant and third party plaintiff, Oldendorf, and the unseaworthiness of its vessel. In a non-jury action Oldendorf impleaded the stevedore, ITO, and the crane company, Hoffman, a New Jersey corporation with its principal place of business in New Jersey, from whom ITO had leased the crane and its operator and oiler to discharge from the vessel a cargo of steel beams.

The Course of Proceedings and Disposition in the Court Below

Lopez' action against Oldendorf was tried to a jury and all claims between Oldendorf, ITO and Hoffman were tried solely to the court as was the action by Lopez against Oldendorf and Hoffman.

In the action by Lopez against Oldendorf the jury returned a special verdict holding that:

1. Lopez failed to establish a claim of unseaworthiness against Oldendorf.

2. Lopez established a claim of negligence against Oldendorf.

3. Lopez' total damages was $365,000.00.

4. Lopez' 15% contributory negligence reduced his damages to $310,250.00, and judgment for such amount was entered against Oldendorf.

In the non-jury action by Oldendorf against ITO and Hoffman, the court held that Lopez' contributory negligence breached ITO's warranty to supply a non-negligent employee to Oldendorf and obligated ITO to indemnify Oldendorf (230a).* The court also held that the raising of the boom was negligent and that the crane operator topped the boom without any signal from the signalman (300a).

Following the jury verdict, the court below denied the plaintiff's motion to amend the complaint to allege a claim against Hoffman (674, Stenographer's Minutes) but later reversed itself and granted the motion (8, Stenographer's Minutes filed February 18, 1976). Lopez amended the com-

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* Unless otherwise indicated, all references are to the Joint Appendix.

plaint against Oldendorf by adding Hoffman as a defendant.

At the conclusion of the non-jury trial of the actions by Oldendorf against ITO and Hoffman and by Lopez against Oldendorf and Hoffman, without making any findings of fact or conclusions of law, the court entered judgment:

1. Awarding Lopez $310,250.00 against Oldendorf and Hoffman jointly and severally.

2. Awarding Oldendorf, if it pays the judgment, indemnity against ITO and Hoffman each for $155,125.00, together with interest thereon and one-half of Lopez' costs.

3. Awarding Hoffman, if it pays the judgment, recovery of ITO for $155,125.00, together with interest thereon and one-half of Lopez' costs.

4. Dismissing ITO's cross-claim against Hoffman for indemnity or contribution.

Statement of Facts

Lopez was injured at about 8:17 A.M. on October 21, 1968, in the No. 1 hold of M/V JOBST OLDENDORF, during the discharge of a cargo of steel beams (17a-18a) at Port Newark, New Jersey (43a). ITO leased a truck crane with its operator and oiler from Hoffman to discharge the cargo (237a). The crane was driven to the pier, positioned (261a) alongside the hatch (76a) and spotted as directed by the deckman (gangwayman or signalman) who gave signals to the crane operator (260a). The crane operator got signals from the signalman who was standing on the fo'c's'le at the forward end of hatch No. 1. The signalman signalled the operator to put a strain on the

first draft and to raise it (277a, 278a). The operator took a strain on the load line and the signalman continued to signal him to raise the draft. The operator paused; the gangwayman looked at him, and the operator signalled to the gangwayman that the operator was going to raise the head of the boom, which he did (252a, 256a). After he gave the gangwayman the topping signal, the gangwayman did not signal the operator to stop at that immedate time (268a). The operator raised the draft and topped the boom (252a). The next signal he received from the gangwayman was to stop about 15 seconds later (248a). During that time the first draft of steel beams dragged across the other steel beams from offshore to inshore (263a, 264a) a distance of 30 to 35 feet (99a), taking 15 seconds during which the gangwayman gave the crane operator no signal to stop (102a). Hoffman's crane expert, William Yokum, testified that when the crane operator gave the gangwayman the topping signal, the gangwayman should have given the crane operator the stop signal if the topping should not be performed (285a, 286a). If the signalman were aware that there was any danger involved, his duty was to stop the operation (289a). Since the gangwayman was standing on the fo'c's'le at the forward end of No. 1 hatch (278a) he could see what was happening in the hold after the crane operator who was aft or him on the dock opposite No. 1 hatch and whom he was facing had given the topping signal, and the gangwayman should have signalled the crane operator to stop, which would have prevented the accident. The crane operator would not top the boom unless he transmitted his wish to the signalman (294a).

POINT I

It was error to grant the shipowner indemnity against Hoffman because the crane operator was the borrowed servant of the stevedore and Hoffman is not liable to the plaintiff, the shipowner or the stevedore by way of indemnity or otherwise.

The shipowner, Oldendorf, engaged the stevedore, ITO, to discharge the vessel. Pursuant to written agreement Hoffman rented a crane and furnished personnel to ITO for employment in connection with the discharge. On arrival of machine and men at the pier, the crane boom was positioned pursuant to direction of ITO. Operations of the crane were directed by hand signals from ITO's signalman on the deck of the vessel to the crane operator on the dock. In these circumstances the crane operator was the employee of the stevedore. The applicable rule is set forth in *Denton* v. *Yazoo & M. V. R. Co.,* 284 U.S. 305 (1932) at p. 308:

> "When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as a servant of the latter and not of the former."

In *McCollum* v. *Smith,* 339 F.2d 348 (9 Cir., 1964) the Court, after citing *Denton* and other cases, stated at p. 351:

> "But as the above cases make clear, it is not essential, in order to constitute an employee a loaned servant, that the general employer relinquish full control over his employee, or that the special employee be completely subservient to the borrower.

> While the latter must possess the power of 'authoritative direction and control' over the employee (Standard Oil v. Anderson, supra 212 U.S. at 222) so that his directions will have 'the force of a command' (Denton v. Yazoo, supra, 284 U.S. at 310), this authority need not extend over every incident of an employer-employee relationship but only over the servant's performance of the particular work in which he is engaged at the time of his negligent act or omission."

In *Helton* v. *United States,* 309 F. Supp. 479 (D.C. Arkansas, 1969) the Court stated at p. 484:

> "The 'borrowed servant' doctrine is an old and established doctrine in admiralty. See Standard Oil Co. v. Anderson, 212 U.S. 215 (1909); Park SS Co. v. Cities Service Oil Co., 188 F.2d 804 (2d Cir., 1951), and cases cited therein. The doctrine is equally well established in Arkansas. (citing cases)
>
> "Briefly stated, the borrowed servant doctrine dictates that when a servant in the general employ of one person comes under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as a servant of the latter and not of the former. This is in accord with the general common law of vicarious liability: *one who is in a position to exercise control over the situation giving rise to injury should bear the loss.*"

The borrowed servant rule set forth above is the law in New York. *Hartell* v. *Simonson & Son Co.,* 218 N.Y. 345 (1916); *Parke-Bernet Galleries, Inc.* v *Franklyn,* 26 N.Y.2d 19; *Moore* v. *Newport Quarries,* 285 App. Div. 640 (4th Dept. 1955). It is also the law in New Jersey,

where the accident occurred. *Errickson* v. *F. W. Schwiers, Jr., Co.,* 108 N.J.L. 481, 158 Atl. 482 (E & A 1932).

Errickson is particularly apposite here. In that case the general employer of an allegedly negligent derrick operator had rented the derrick and its operator to Hill Dredging Company. Hill employed the plaintiff who was injured when struck by lumber which fell from the lifting sling. Plaintiff claimed that the crane operator remained the employee of his general employer, Schwiers, and sought to impose *respondeat superior* liability on Schwiers. The Court, in denying recovery, stated, 108 N.J.L. at 484:

> "The derrick operator had nothing whatever to do with moving the lumber other than to obey the signals given him by the Hill Company's employees, operating the derrick only as and when they told him to do so. We therefore think that the defendant was not an independent contractor and that the operator of the derrick was a fellow employee of the plaintiff, and if negligent in that operation, his negligence cannot be charged against the defendant corporation."

If the shipowner is held in damages by reason of negligent operation of the crane its remedy by way of indemnity or otherwise is against the stevedore liable for the activities of its borrowed servant and not against Hoffman. Similarly, if the shipowner is entitled to indemnity against the stevedore the stevedore may not recover on its cross-claim against Hoffman for the negligence of the stevedore's borrowed servart, the crane operator.

Since the crane operator was ITO's borrowed servant Lopez has no cause of action against Hoffman.

POINT II

It was error for the court to grant plaintiff's motion for a direct action against Hoffman without requiring plaintiff to move pursuant to FRCP 14(a).

Rule 14(a) of the Federal Rules of Civil Procedure provides that a "plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff . . ." Hoffman was joined as a third party defendant in July 1973, and plaintiff has offered no reason or excuse for his not having attempted to assert a direct claim against it sooner than February 5, 1976, other than that there is no diversity between plaintiff and Hoffman (Stenographer's Minutes, 314).

Procedurally, the above-noted provision of Rule 14(a) is effected by means of an amendment to the pleadings under Rule 15 of the Federal Rules of Civil Procedure. 3 J. Moore, Federal Practice ¶ 14.16[1] at 14-376 (2 ed. 1974). Rule 15(a), in turn, directs that leave to amend "shall be freely given when justice so requires." However, undue delay in seeking such leave is well recognized as a criteria favoring denial of the motion. 3 J. Moore, *supra* ¶ 15.08[4] at 898. The plaintiff's delay in making the informal motion without compliance with said rules relieved the plaintiff of the burden under the doctrine of laches of showing that there was no prejudice to Hoffman and deprived Hoffman of the opportunity to show the serious manifest prejudice to Hoffman by reason of the plaintiff's delay of more than seven (7) years from October 21, 1968, the date of the accident, in asserting a direct claim in negligence against Hoffman.

POINT III

It was error for the court to take jurisdiction in the direct action between Lopez and Hoffman, both citizens of New Jersey, because there was no diversity of citizenship.

28 USC § 1332 confers original jurisdiction upon the district court in diversity cases. Subsection (a) provides:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> "(1) citizens of different States; * * *."

Subsection (c) provides that "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

CONCLUSION

(1) There is no basis for any recovery by Oldendorf against Hoffman under any warranty of workmanlike service because ITO hired Hoffman.

(2) There is no basis for recovery by ITO against Hoffman because the crane operator was ITO's borrowed servant.

(3) There is no basis for any recovery by Lopez against Hoffman because any negligence on the part of the crane operator is attributable to ITO whose borrowed servant he was.

(4) The court had no jurisdiction over the action by Lopez against Hoffman because there was no diversity.

(5) The action by Lopez against Hoffman was barred by laches.

(6) The lack of any findings of fact or conclusions of law by the court below with respect to Hoffman eliminates any basis in fact or law for recovery of damages by any party against Hoffman.

(7) The decision of the court below should be reversed and Oldendorf's third party complaint and Lopez' amended complaint against Hoffman should be dismissed with costs.

Respectfully submitted,

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United States Court of Appeals
foe the Second Circuit

Benito Lopez
Plaintiff-Appellee
against
Egan Oldsmobile
Defendant and Third Party
Plaintiff-Appellant
against
International Terminal Operating Co. Inc. et al.
Third Party Defendants-Appellants

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss:

Raymond J. Braddick, agent for Hill, Betts & Nash Esqs. being duly sworn, deposes and says that he is over the age of 21 years and resides at

Levittown, New York

That on the 26th. day of July , 1976

he served the annexed Brief of Third Party Defendant-Appellant upon

DiCostanza, Klonsky & Curtona Esqs.
66 Court Street, Brooklyn, New York
Attorneys for Benito Lopez

Cichanowicz & Callan Esqs.
80 Broad Street, New York, New York
Attorneys for Egan Oldendorf

Alexander Ash Schwartz & Cohen
801 Second Avenue New York, New York
Attorneys for International Terminal Operating Co. Inc.

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 26th. day of July, 1975

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 19 77